

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

MARY WOODHOUSE

FAA Order No. 95-9

Served: May 9, 1995

Docket No. CP94WP0184, 94EAJAWP0017

ORDER

On December 7, 1994, Administrative Law Judge Robert L. Barton, Jr., issued a written initial decision in this case denying Mary Woodhouse's application for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.¹ The law judge held in this initial decision that Ms. Woodhouse had submitted her application for expenses and fees in an untimely fashion. Ms. Woodhouse next filed an untitled six-page document dated January 3, 1995, appealing the law judge's decision to the Administrator. Ms. Woodhouse did not file a notice of appeal within 10 days of the issuance of the law judge's initial decision, contrary to the requirements of 14 C.F.R. § 13.233(a). Because good cause exists for Ms. Woodhouse's failure to file a notice of appeal within 10 days of service of the law judge's decision, Ms. Woodhouse's appeal will not be dismissed. Her detailed appeal document is construed as both a notice of appeal and an appeal brief. Finally, agency counsel is granted 35 days from the date of service of this order in which to file a reply brief.

¹ The law judge's written initial decision dated December 7, 1994, is attached.

The Administrator issued his decision and order in the underlying case, In the Matter of Woodhouse, FAA Order No. 94-2, on March 10, 1994.

Ms. Woodhouse had 60 days to petition a U.S. Court of Appeals for review of the Administrator's order under 49 U.S.C. App. § 1486(a).² Ms. Woodhouse filed her petition for review with the U.S. Court of Appeals for the Ninth Circuit on May 13, 1994, 4 days late. By order dated June 23, 1994, the Court granted the motion to dismiss filed by the agency counsel and dismissed Ms. Woodhouse's petition for lack of jurisdiction. Subsequently, the court issued an order dated July 28, 1994, in which it construed Ms. Woodhouse's late opposition to the agency counsel's motion to dismiss as a motion to reconsider the Court's order of June 23, 1994, and denied the motion to reconsider.

On August 22, 1994, Ms. Woodhouse filed a petition for attorney's fees and costs under the EAJA. The law judge held a telephone conference, and on December 7, 1994, he issued a written initial decision. In his written initial decision, the law judge held that Ms. Woodhouse's petition under the EAJA was late-filed. (Initial Decision at 11.)

On appeal of the law judge's December 7, 1994, initial decision, Ms. Woodhouse is once again late. Section 14.28 of the FAA's rules implementing the EAJA provides in pertinent part that "[e]ither the applicant or the FAA counsel may seek review of the initial decision on the fee application in accordance with . . .

² Recodified as 49 U.S.C. § 46110.

14 CFR 13.233.” 14 C.F.R. § 14.28.³ Section 13.233(a) provides in pertinent part:

A party may appeal the initial decision . . . by filing a notice of appeal with the FAA decisionmaker A party shall file the notice of appeal not later than 10 days after . . . service of the written initial decision on the parties

14 C.F.R. § 13.233(a). Ms. Woodhouse’s notice of appeal should have been filed no later than December 22, 1994,⁴ but she did not file her appeal document until January 3, 1995.

³ 14 C.F.R. § 14.28 provides in full:

Either the applicant or the FAA counsel may seek review of the initial decision on the fee application in accordance with subpart G of part 13 of the Federal Aviation Regulations, specifically 14 CFR 13.233. Additionally the FAA decisionmaker may decide to review the decision on its own initiative. If neither the applicant nor the agency counsel seeks review within 30 days after the decision is issued, it shall become final. Whether to review a decision is a matter within the discretion of the FAA Decisionmaker. If review is taken, the FAA Decisionmaker will issue a final decision on the application or remand the application to the administrative law judge who issued the initial fee award determination for further proceedings.

14 C.F.R. § 14.28 (Emphasis added.) It is held herein that under 14 C.F.R. § 14.28, a party seeking review of an initial decision by a law judge on a fee application must, under 14 C.F.R. § 13.233, file a notice of appeal within 10 days of the issuance of that order and must perfect that appeal by filing an appeal brief. The applicant and the agency counsel do not have 30 days or until the initial decision becomes final to file the notice of appeal and/or appeal brief.

The National Transportation Safety Board (NTSB) has a similar regulatory scheme for the review of initial decisions on fee applications. Section 826.38, 49 C.F.R. § 826.38, provides that either the applicant or the agency counsel may seek review of an initial decision on a fee application in accordance with 49 C.F.R. Part 821, Subpart H, for FAA safety enforcement matters. It is provided in 49 C.F.R. § 821.47 that a party may appeal from a law judge’s decision to the full Board by filing a notice of appeal within 10 days of the issuance of that order or decision. Section 826.38 also provides that if neither the applicant nor agency counsel seeks review and the Board does not decide to review the decision on its own initiative, then the decision will become final within 30 days. 49 C.F.R. § 826.38.

In Administrator v. Moore, NTSB Order No. EA-3570, the NTSB interpreted the requirement to file a notice of appeal within 10 days and the provision that an unappealed decision that the full Board does not decide to review becomes final within 30 days in the same way that the similar provisions in the FAA’s procedural rules discussed above are being interpreted today. In Administrator v. Moore, the NTSB held that the agency counsel’s failure to file a timely notice of appeal was not excused by the fact that agency counsel had filed an appeal brief before the law judge’s initial decision on a fee application became final. *Id.*

In contrast to 14 C.F.R. § 14.28 and 49 C.F.R. § 826.38, the pertinent rule in the Department of Transportation’s rules implementing the EAJA, 49 C.F.R. § 6.35, does not contain a cross-reference to any regular DOT appeal procedures. It only contains a provision that unless appealed by the agency counsel or the applicant, the law judge’s initial decision on a fee application will become final within 30 days.

⁴ Because the law judge had issued a written initial decision which was mailed to the parties,

However, good cause exists for excusing Ms. Woodhouse's failure to file a notice of appeal within 10 days. At the end of the law judge's initial decision, the law judge provided Ms. Woodhouse with a notice of her appeal rights. In this notice, the law judge wrote that a written notice of appeal must be filed no later than 30 days after the service date of the written initial decision. (Initial Decision at 22.) Under these circumstances, it would be unfair to dismiss Ms. Woodhouse's appeal for untimeliness, because she did file her appeal document within 30 days of the service date of the initial decision.

Ms. Woodhouse was required to perfect her appeal within 50 days of the service of the law judge's initial decision on her fee application by serving an appeal brief. 14 C.F.R. §§ 14.28 and 13.233. While Ms. Woodhouse did not file a separate appeal brief, her appeal document filed on January 3, 1995, was sufficiently detailed to satisfy the requirements of an appeal brief set forth in 14 C.F.R. § 13.233(d)(1). Hence, Ms. Woodhouse's appeal document will be construed as both a notice of appeal and an appeal brief.

Agency counsel will be given an opportunity to file a reply brief. The reply brief must be filed within 35 days of the service of this order.

Ms. Woodhouse had an extra five days in which to file her notice of appeal with the Administrator under the "mailing rule," 14 C.F.R. § 13.210(e).

THEREFORE, IT IS ORDERED that:

1. Ms. Woodhouse's appeal is construed as both a notice of appeal and an appeal brief;
2. Good cause exists to excuse Ms. Woodhouse's late-filed notice of appeal; and
3. Agency counsel is granted 35 days from the date of service of this order to file a reply brief.



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of May, 1995.